

Contracts BULLETIN

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COVID-19: Increased Construction Costs

Many subcontractors have faced additional costs associated with performing work at jobsites during the COVID-19 outbreak. These additional COVID-19-related costs come in many forms, including extra hand-washing stations, before-shift health checks, and larger quantities of personal protective equipment such as gloves, masks, and goggles. This article discusses several common construction contract provisions that could allow subcontractors to recover costs incurred as a result of COVID-19. Any potential cost recovery under these provisions will depend on the specific language in the relevant contract and the specific circumstances encountered at each jobsite.

Concealed or Unknown Conditions

Form contracts such as those produced by AIA and ConsensusDocs allow contractors, in certain circumstances, to change the contract sum and contract time due to “concealed or unknown conditions” with approval of the architect. AIA-201 defines “concealed or unknown conditions” as follows:

conditions at the site that are (1) subsurface or otherwise concealed physical conditions that differ materially from those indicated in the Contract Documents or (2) unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities of the character provided for in the Contract Documents . . .

AIA-201 (2007) ConsensusDocs defines “concealed or unknown conditions” with nearly identical language. This contract provision typically covers conditions at the jobsite such as asbestos, environmental contamination, or unknown sub-surface soil conditions. However, an argument could be made that COVID-19-related conditions at the jobsite, such as an employee or multiple employees testing positive for COVID-19, are “unknown physical conditions of an unusual nature that differ materially from those ordinarily found to exist and generally recognized as inherent in construction activities.”

Force Majeure

Many construction contracts contain a “force majeure” provision allowing a subcontractor to delay or stop performance under the contract due to certain, unforeseen circumstances. Some force majeure provisions specifically define the events that allow a subcontractor to delay or stop performance, while other contain broader, “catch all” categories. For example, AIA-201 contains the following force majeure provision:

8.3.1 If the Contractor is delayed at any time in the commencement of progress of the Work by (1) an act or neglect of the Owner or Contractor, of an employee of either, or of a Separate Contractor; (2) by changes ordered in the Work; (3) by labor disputes, fire, unusual delay in deliveries, unavoidable casualties, adverse weather conditions documented in accordance with Section 15.1.6.2, or **other causes beyond the Contractor’s control**; (4) by delay authorized by the Owner pending mediation and binding dispute resolution; or (5) by other causes that the Contractor asserts, and the Architect determines, justify delay, then the Contract Time shall be extended for such reasonable time as the Architect may determine.

AIA-201 (2007) (emphasis added). While there is little question that the outbreak of COVID-19 is an unforeseen circumstance, the party that bears the risk of loss for any resulting construction delays will be dictated by the language of the controlling written agreement. For a more detailed discussion of force majeure contract provisions as they relate to COVID-19, please review the recent SMACNA Contracts Bulletin at the following link: [Force Majeure Provisions: COVID-19](#).

Change of Law

Some construction contracts contain a “change of law” or “change in law” provision that may allow for additional time or compensation if there is a change to federal, state, or local law during the term of the contract. ConsensusDocs 750 requires “Subcontractor . . . to comply with the Law at its own cost.” ConsensusDocs 750 (2011). However, the same section of the form agreement allows “the Subcontract Amount or Progress Schedule [to be] equitably adjusted for changes in the Law enacted after the date of this Agreement” if the “Constructor receives reimbursement of additional time from Owner under the prime agreement.” *Id.* The COVID-19 outbreak has resulted in numerous changes to federal, state, and local law that require increased compliance costs on the part of subcontractors. If the relevant construction contract contains a “change of law” provision, it could provide a source of recovery for these additional compliance costs.

Change Orders

Another potential avenue for recovery of the additional COVID-19-related costs is through a change order. Prior to originating a change order, it is a good idea to review the original contract to determine the steps required to institute the change, with particular attention paid to any relevant notice provisions. For example, ConsensusDocs 750 provides for the following:

“7.1 Subcontractor may request or Constructor may order changes in the Subcontract Work or the timing or sequencing of the Subcontract Work that impacts the Subcontract Amount or Subcontract Time. A change in the Subcontract Work that affects the Subcontract Amount or Subcontract Time shall be formalized in a Subcontract Change Order and processed in accordance with this article.”

ConsensusDocs 750 (2011). Under the ConsensusDocs contract, subcontractors may request a change to the subcontract work that affects the subcontract amount. It is important for subcontractors to properly document additional costs resulting from COVID-19 in order to best justify any change to the subcontract amount. Subcontractors should consider implementing cost codes to track COVID-19-specific costs such as:

- Material cost increases for production delays and supply chain disruption;
- Inspection delays or additional costs incurred due to updated inspections processes;
- Costs of additional personal protective equipment or health inspections;
- Increased equipment needs (are two boom/scissor lifts now needed to maintain proper distance between workers?);
- Labor costs incurred due to jobsite shutdowns; and
- Technology costs to implement remote owner, architect, and contractor meetings or inspections.

Bottom Line

Every construction contract is different, and parties frequently alter AIA, ConsensusDocs, and other form contracts during the negotiation process. Careful review of the relevant contract is the only way for a subcontractor to understand all options available for recouping COVID-19-related costs. Additionally, any request for a change in the contract sum due to COVID-19-related costs should include detailed documentation of all costs incurred by the subcontractor.

This Bulletin was written by SMACNA's General Counsel, Felhaber Larson